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into or out of such warehouses, depositories and other similar entities, as well as any other information concerning commodities stored in such warehouse, depositories and other similar entities and which are or may be available for delivery on futures contracts or options on physicals; and

(c) To permit visitation of the premises and inspection of the books and records of such warehouses, depositories and other similar entities by duly authorized representatives of the Commission or the Department of Justice, and to keep all books, records, papers, and memoranda relating to the storage and warehousing of commodities in such warehouse, depository or other similar entity for a period of 5 years from the date thereof.

(Approved by the Office of Management and Budget under control number 3038–0019)

(Sec. 5a, 49 Stat. 1497; 7 U.S.C. 7a)

[41 FR 3194, Jan. 21, 1976, as amended at 46 FR 63035, Dec. 30, 1981; 47 FR 57009, Dec. 22, 1982]

§ 1.45 [Reserved]

§ 1.46 Application and closing out of offsetting long and short positions.

(a) *Application of purchases and sales.*

(1) Except with respect to purchases or sales which are for omnibus accounts, or where the customer or account controller has instructed otherwise, any futures commission merchant who, on or subject to the rules of a designated contract market or registered derivatives transaction execution facility:

(i) Purchases any commodity for future delivery for the account of any customer when the account of such customer at the time of such purchase has a short position in the same future of the same commodity on the same market;

(ii) Sells any commodity for future delivery for the account of any customer when the account of such customer at the time of such sale has a long position in the same future of the same commodity on the same market;

(iii) Purchases a put or call option for the account of any option customer when the account of such option customer at the time of such purchase has a short put or call option position with the same underlying futures contract

or same underlying physical, strike price, expiration date and contract market as that purchased; or

(iv) Sells a put or call option for the account of any option customer when the account of such option customer at the time of such sale has a long put or call option position with the same underlying futures contract or same underlying physical, strike price, expiration date and contract market as that sold—shall on the same day apply such purchase or sale against such previously held short or long futures or option position, as the case may be, and shall, for futures transactions, promptly furnish such customer a statement showing the financial result of the transactions involved and, if applicable, that the account was introduced to the futures commission merchant by an introducing broker and the names of the futures commission merchant and introducing broker.

(2) Any futures commission merchant or retail foreign exchange dealer who:

(i) Engages in a retail forex transaction involving the purchase of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such purchase has an open retail forex transaction for the sale of the same currency;

(ii) Engages in a retail forex transaction involving the sale of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such sale has an open retail forex transaction for the purchase of the same currency;

(iii) Purchases a put or call option involving foreign currency for the account of any option customer when the account of such option customer at the time of such purchase has a short put or call option position with the same underlying currency, strike price, and expiration date as that purchased; or

(iv) Sells a put or call option involving foreign currency for the account of any option customer when the account of such option customer at the time of such sale has a long put or call option position with the same underlying currency, strike price, and expiration date as that sold—shall immediately apply

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such purchase or sale against such previously held opposite transaction, and shall promptly furnish such retail forex customer a statement showing the financial result of the transactions involved and, if applicable, that the account was introduced to the futures commission merchant or retail foreign exchange dealer by an introducing broker and the names of the futures commission merchant or retail foreign exchange dealer, and the introducing broker.

(b) *Close-out against oldest open position.* In all instances wherein the short or long futures, retail forex transaction or option position in such customer's, retail forex customer's or option customer's account immediately prior to such offsetting purchase or sale is greater than the quantity purchased or sold, the futures commission merchant or retail foreign exchange dealer shall apply such offsetting purchase or sale to the oldest portion of the previously held short or long position: Provided, That upon specific instructions from the customer or option customer the offsetting transaction shall be applied as specified by the customer or option customer without regard to the date of acquisition of the previously held position; and Provided, further, that a futures commission merchant or retail foreign exchange dealer, if permitted by the rules of a registered futures association, may offset, at the customer's request, retail forex transactions of the same size, even if the customer holds other transactions of a different size, but in each case must offset the transaction against the oldest transaction of the same size. Such instructions may also be accepted from any person who, by power of attorney or otherwise, actually directs trading in the customer's, retail forex customer's or option customer's account unless the person directing the trading is the futures commission merchant or retail foreign exchange dealer (including any partner thereof), or is an officer, employee, or agent of the futures commission merchant or retail foreign exchange dealer. With respect to every such offsetting transaction that, in accordance with such specific instructions, is not applied to the oldest portion of the previously held position,

the futures commission merchant or retail foreign exchange dealer shall clearly show on the statement issued to the customer, retail forex customer or option customer in connection with the transaction, that because of the specific instructions given by or on behalf of the customer, retail forex customer or option customer the transaction was not applied in the usual manner, *i.e.*, against the oldest portion of the previously held position. However, no such showing need be made if the futures commission merchant or retail foreign exchange dealer has received such specific instructions in writing from the customer, retail forex customer or option customer for whom such account is carried.

(c) *In-and-out trades; day trades.* Notwithstanding the provisions of paragraphs (a) and (b) of this section shall not be deemed to require the application of purchases or sales closed out during the same day (commonly known as "in-and-out trades" or "day trades") against short or long positions carried forward from a prior date.

(d) *Exceptions.* The provisions of this section shall not apply to:

(1) Purchases or sales of commodity options constituting "bona fide hedging transactions" pursuant to rules of the contract market which have been adopted in accordance with the requirements of § 1.61(b) and approved by the Commission pursuant to; section 5a(a)(12)(A) of the Act *Provided*, That no contract market or futures commission merchant shall permit such option positions to be offset other than by open and competitive execution in the trading pit or ring provided by the contract market, during the regular hours prescribed by the contract market for trading in such commodity option.

(2) Purchases or sales constituting "bona fide hedging transactions" as defined in § 1.3(z); nor

(3) Sales during a delivery period for the purpose of making delivery during such delivery period if such sales are accompanied by instructions to make delivery thereon, together with warehouse receipts or other documents necessary to effectuate such delivery.

(4)-(7) [Reserved]

(8) Purchases or sales held in error accounts, including but not limited to

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floor broker error accounts, and purchases or sales identified as errors at the time they are assigned to an account that contains other purchases or sales not identified as errors and held in that account (“error trades”), provided that:

(i) Each error trade does not offset another error trade held in the same account;

(ii) Each error trade is offset by open and competitive means on or subject to the rules of a contract market by not later than the close of business on the business day following the day the error trade is discovered and assigned to an error account or identified as an error trade, unless at the close of business on the business day following the discovery of the error trade, the relevant market has reached a daily price fluctuation limit and the trader is unable to offset the error trade, in which case the error trade must be offset as soon as practicable thereafter; and

(iii) No error trade is closed out by transferring such an open position to another account also controlled by that same trader.

(e) The statements required by paragraph (a) of this section may be furnished to the customer or the person described in § 1.33(d) by means of electronic transmission, in accordance with § 1.33(g).

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(Secs. 4g, 5, 42 Stat. 1000, 49 Stat. 1496; 7 U.S.C. 6g, 7; secs. 4g, 5, 8a; 7 U.S.C. 6g, 7, 12a)

[41 FR 3194, Jan. 21, 1976]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 1.46, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§ 1.47 Requirements for classification of purchases or sales of contracts for future delivery as bona fide hedging under § 1.3(z)(3) of the regulations.

(a) Any person who wishes to avail himself of the provisions of § 1.3(z)(3) of the regulations and to make purchases or sales of any commodity for future delivery in any commodity in excess of trading and position limits then in effect pursuant to section 4a of the Act shall file statement with the Commis-

sion in conformity with the requirements of this section. All or a specified portion of the transactions and positions described in these statements shall not be considered as bona fide hedging if such person is so notified by the Commission:

(1) Within 30 days after the Commission is furnished the information required under paragraph (b) of this section, or

(2) Within 10 days after the Commission is furnished with the information required under paragraph (c) of this section.

The Commission may request the person notified to file specific additional information with the Commission to support a determination that all, or the specified portion, of the transactions and positions be considered as bona fide hedging transactions and positions. In such cases, the Commission shall consider all information so filed and, by notice to such person, shall specify the extent to which the Commission has determined that the transactions and positions may be classified as bona fide hedging. In no case shall transactions and positions described be considered as bona fide hedging if they exceed the levels specified in paragraph (d) of this section.

(b) *Initial statement.* Initial statements concerning the classification of transactions and positions as bona fide hedging pursuant to § 1.3(z)(3) shall be filed with the Commission at least 30 days in advance of the date that such transactions or positions would be in excess of limits then in effect pursuant to section 4a of the Act. Such statements shall:

(1) Describe the transactions and positions for future delivery and the offsetting cash positions;

(2) Set forth in detail information which will demonstrate that the purchases and sales are economically appropriate to the reduction of risk exposure attendant to the conduct and management of a commercial enterprise;

(3) Contain, and upon request of the Commission be supplemented by, such other information which is necessary to enable the Commission to make a determination whether the particular purchases and sales for future delivery